





NEVADA
**STATE ENVIRONMENTAL
 COMMISSION**

**Draft
 Minutes**

SEC Prehearing Conference

ABC Recycling Industries, LLC

Reclamation Permit #0171

 TIME	 LOCATION
June 12, 2020 9:00 A.M.	In accordance with Governor Sisolak’s Emergency Directive 006; Subsection 1, this hearing was conducted via Lifesize.

SEC members present:

E. Jim Gans, chair
 Tom Porta, vice-chair
 Kacey KC

SEC staff present:

Henna Rasul, AGO office
 Valerie King, executive secretary
 Jessica Lunz, recording secretary

Defendant – Nevada Division of Environmental Protection:

Dan Nubel, deputy attorney general
 Frederick "Rick" Perdomo, deputy administrator/NDEP

Appellant – ABC Recycling Industries, LLC:

Byron Thomas, attorney
 Robert Ford, ABC Recycling Industries, LLC

Nevada Division of Environmental Protection staff present:

Joe Sawyer
 Rob Kuczynski
 Todd Process
 Todd Suessmith
 Rebecca Zimmerman

Begin summary minutes

1) Call to Order, Roll Call, Establish Quorum (Discussion)

Chairman Jim Gans called the prehearing conference to order on Friday, June 12, 2020 at 9:15AM. He introduced his colleagues serving with him on the panel, Mr. Tom Porta and Ms. Kacey KC. He explained that the prehearing conference was in response to a February 17, 2020 request for an appeal hearing from ABC Recycling Industries, LLC (ABC) following the revocation of its Reclamation Permit #0171 by the Nevada Division of Environmental Protection, NDEP. ABC contended in its request that NDEP's final decision was affected by error of the law. On March 11th, 2020, NDEP filed a Motion for Summary Judgment.

Chairman Gans said the panel's role was to rule on NDEP's Motion for Summary Judgment. Summary judgment would be awarded if the undisputed facts and the law made it clear that it would be impossible for one party to prevail if the matter were to proceed to an appeal hearing. The panel must consider all designated evidence in light of the most favorable to the party opposing the summary judgment motion (ABC). The proceeding is a prehearing conference conducted pursuant to NRS Chapter 233B.

Chairman Gans asked everyone to introduce themselves. Present at the hearing were:

Byron Thomas, representing ABC

Robert Ford, ABC Manager

Dan Nubel, Deputy Attorney General representing NDEP

Rick Perdomo, Deputy Administrator at NDEP

Henna Rasul, SEC Legal Counsel

Val King, Executive Secretary NDEP

2) Public comment #1 (Discussion)

There were no public comments.

3) Prehearing Conference regarding Reclamation Permit #0171 (For Possible Action)

Chairman Gans explained the prehearing conference would have three parts. First, NDEP would present the basis for its motion for summary judgment. Following that, they would hear ABC's opposition to the motion for summary judgment. Then finally, NDEP would be given an opportunity to reply. The panel would have the opportunity to ask questions after each argument.

Part I: Mr. Nubel stated that NDEP was asking the Commission to enter summary judgment in favor of NDEP. He said the facts and law of this case were straightforward. Statute and regulation required reclamation permit holders to submit an annual fee to NDEP by April 15th of each year. And ABC failed to submit its fee by April 15th, 2019.

NDEP gave ABC an opportunity to come into compliance by September 13th, 2019. ABC refused to pay. NDEP again extended the deadline to October 11th, 2019. ABC still refused to comply. Finally, NDEP held a hearing with ABC on January 10th, 2020, and NDEP gave ABC one final chance to come into compliance by January 24th. ABC still refused to come into compliance.

Despite these many opportunities, ABC never paid its annual fee and so NDEP justifiably revoked ABC's permit.

ABC's appeal claimed that NDEP committed an error of law in revoking ABC's permit, but an allegation of an error of law requires ABC to show that NDEP acted outside of its legal authority in revoking the permit. ABC cannot do that here. NRS 519A.150, subsection 9, specifically grants NDEP the authority to suspend or revoke a permit for a permit holder's violation of a statute or a regulation. ABC's failure to pay its required annual fee is exactly that, a violation of NRS 519A.260 and Nevada Administrative Code 51A.235.

Summary judgment is appropriate when no genuine issues of material fact exist. In this case, the only material fact is whether or not ABC paid its required annual fee. There is no genuine dispute as to this fact. ABC's briefing admits that it did not pay the annual fee. Instead, ABC's briefing seemed to contend that ABC was justified in not paying the required fee because of issues relating to an alleged reclamation plan. It's important to note that ABC's contentions relating to the requested reclamation plan are not true. ABC never submitted a request to revise its reclamation plan to NDEP. But any potential revised reclamation plan is irrelevant to this case.

Mr. Nubel said no statute or regulation allowed ABC to refuse to pay its required permit fee because it feels it has been wronged. Such a ruling would be disastrous to NDEP's mission because it would encourage unlawful withholding of fees that fund the Bureau for Mining and Reclamation.

Mr. Nubel closed by saying since there is no dispute as to the material fact in this case, NDEP is entitled to judgment as a matter of law. The law is clear that NDEP has the legal authority to revoke a permit for a permit holder's withholding of the fee. The Commission should enter a judgment in NDEP's favor on ABC's appeal because there are no genuine issues of material fact and NDEP acted within its authority to revoking ABC's permit.

Chairman Gans asked Mr. Nubel if it was correct that NDEP narrowed this down to one thing. They've narrowed this down to merely the payment or nonpayment of an annual fee. Was that correct?

Mr. Nubel answered yes, that is what the motion was about; there was one material fact to NDEP's decision to revoke ABC's permit, and the basis for that was stated within the letter that NDEP sent to ABC revoking the permit. Because the panel has that information, that ABC did not pay its fee, they can make the legal determination that ABC was required to pay the fee and that NDEP has the authority to revoke a permit based on a permit holder's nonpayment of the fee. All other issues to the case were immaterial and irrelevant because NDEP's basis for revoking the permit was supported by law and fact.

Chairman Gans asked Mr. Nubel to supply the language from the NRS that supported NDEP's position.

Mr. Nubel read NRS 519A.150, Subsection 9 -- The Powers of the Division:

"One of the powers of the Division is to suspend or revoke a permit upon a noticed hearing and

finding by the Division that the holder of the permit has violated any provision of NRS 519A.010 to 519A.280, inclusive, a plan of reclamation, any condition placed on a plan of reclamation or any regulation adopted by the Commission.”

Mr. Nubel then read the statute that requires ABC to pay its annual fee -- NRS 519A.260:

“That each operator shall, on or before April 15th of each year, submit to the Administrator a report relating to the status and production of all mining operations and exploration projects in which the operator has engaged and identifying each acre of land affected and land reclaimed by that mining operation or exploration project through the preceding calendar year. And shall pay to the Division a fee of (a) One dollar and fifty cents for each acre of public land administered by a federal agency; and (b) Five dollars and fifty cents for each acre of privately owned land.”

Mr. Nubel noted that the briefing by ABC doesn't even argue that the fee was due. It doesn't argue that the fee wasn't paid, and it doesn't argue that NDEP can't revoke a permit for the failure to pay a fee. It just tries to sidestep the entire issue by talking about some kind of revised reclamation plan that they say was submitted, but was not.

Mr. Nubel said the issue was very narrow -- does a permit holder have to pay a fee? That was a legal determination that the panel could make. Did ABC pay its required fee? No. That's a fact that is admitted by the other side. They admitted in their briefing, and it's a fact that's supported by the exhibit that NDEP submitted, the declaration of Joe Sawyer, who is the head of NDEP's Bureau of Mining and Reclamation. Does NDEP have the authority to legally revoke ABC's permit based on that nonpayment? Yes, it does.

Ms. KC had a question. Part of the requirement was to submit an annual report as well as payment for the annual fee. Did the report come in?

Mr. Nubel said he didn't think so, but he could get verification from NDEP.

Part II: Mr. Byron Thomas from ABC Recycling provided ABC's position. ABC's position is that the withdrawal or the revocation of the license was simply a pretext regarding the stalled negotiations concerning the reclamation plan. Maybe the reclamation plan was not actually submitted, but there were ongoing negotiations between the parties concerning the reclamation. At issue, when the bond for the property was initially calculated in 2008, it was substantially inadequate. The previous owner of the property, American Borate [phonetic], caused substantial damage to the property.

When ABC Recycling came in, they found the dangerous conditions and spent millions trying to ameliorate them. The issue came about when the state refused to take into account the use of greenways to help ameliorate the problem without any consideration for all the millions of dollars that had already been spent.

ABC's position is they were negotiating in good faith with NDEP. They were trying to resolve this matter. To revoke the permit, when ABC had been negotiating in good faith, is "pre-textual and a part of an arbitrary and capricious ruling that is simply not allowed." And that is the basis for why the motion for summary judgment should be denied.

Mr. Ford from ABC took the floor to share some history of the property. He stated he purchased the property at a foreclosure sale in 2011. In 2012 Mr. Ford met with Bruce Holmgren who allowed him to put a cover of green waste on the property. According to Mr. Ford, Todd Suessmith told him, "You can take the reclamation bond, and if you can't get nothing to grow, I'll just end the permit." Because this is not an active mine permit; it is a reclamation job that's not happening because the plan that they had from American Borate in 1999 said it was going to dry by 2013.

The material has not dried as of today; the material is still wet. It was planned to be a six-inch covering and it ended up taking six feet of covering. Mr. Ford got some NDEP bond releases from Mr. Holmgren and on the last release he said, "Robert has put in three feet of material on his property and it helped it a lot." Mr. Ford has those letters.

Mr. Ford met with Bruce Holmgren, Todd Suessmith, and Todd Process. Mr. Ford said they advised him to hire a consultant. He hired Nate Robertson, who according to Mr. Ford, told him to keep quiet about the ponds over the limit. Mr. Ford hired another engineer who was unable to help him until after the date NDEP wanted him to pay the payment.

Mr. Ford said he did not make this problem. The problem was made by American Borate. No survey was ever done. Mr. Ford said he could get enough materials to finish covering just like Bruce Holmgren and Todd Suessmith told him to use to get this thing finished, and everybody would win. But Mr. Ford was not going to go up there and dump something illegally or have somebody tell him Bruce was no longer here; you can't dump it. The only thing left on this permit is soils enhancement and it's part of the permit. It's written right on the permit on the second page, you can enhance the soil with anything that you can get that's going to improve the soils.

Mr. Ford said he has no problem paying the money if there was an agreement. But NDEP doesn't want to work with him on giving him an agreement.

Mr. Thomas said to follow up, ABC's issue is that this is a much broader issue than what NDEP is saying it is. Mr. Thomas said, "it's simply a pretext and it is also arbitrary and capricious." That's why he put in the 56F motion (a request for more time) to gather more documents to show that this is really just a pretext and that it's arbitrary.

Ms. KC said she read all the letters that were provided, and didn't see all the ones Mr. Ford had mentioned.

Mr. Thomas said he knew that, and that's why he wanted more time to gather the evidence to

oppose this as required by law by 56F. The letters would be a part of the additional evidence that they could produce if 56F was approved.

Mr. Porta asked when was a reclamation plan actually submitted to NDEP for approval? Mr. Ford replied in 2011 and 2012.

Mr. Porta asked was this plan approved? Mr. Nubel said no plan was ever submitted to the Division in writing as was stated under the rule.

Chairman Gans said if Mr. Thomas was trying to make the argument that the Division was holding up the plan and ABC was not going to pay the fee because of that, and they haven't even submitted a plan, he failed to see the connection.

Mr. Thomas said the connection was that they've been negotiating to try to resolve these issues, and at one point they were told there wasn't a need to modify the plan. Now all of a sudden there is. So, they were just trying to figure out exactly what was going on.

Mr. Ford said the plan was submitted three times. But the new people at NDEP don't know that. Mr. Ford said he has proof that every one of them was submitted.

Chairman Gans said he was troubled. He said he wasn't sure that this hearing was the place and the method of resolving what ABC was bringing forward. He said he was concerned about ABC not meeting the law when it says they have to pay annually. He asked ABC do they disagree with the intent or the letter of that law for the annual payment?

Mr. Thomas said, "To the extent that the law is used as a pretext" he does disagree. He said, "Any time the state deals with a citizen, it has to deal with that citizen fairly and reasonably. It can't simply use a \$4,000 bond to get rid of millions of dollars of work. That's simply a pretext. It's right up there with arbitrary and capricious, and it's a wider issue that needs to be addressed. Any decision that is arbitrary and capricious is grounds for that decision being reversed. The idea that they would revoke a permit for \$4,000 is arbitrary, is capricious, is simply a pretext."

Chairman Gans said whenever an entity files for a hearing, the panel has the obligation of making sure they are following the law. Neither this panel nor the SEC has any authority under the law to say that ABC doesn't have to pay their annual fee.

Chairman Gans said he really didn't like this kind of impasse when two parties put the panel in a position to rule on the law. This needed to get this resolved, but the hearing might not be the method to get it resolved. The panel had no authority to tell ABC whether or not to pay the fee.

Mr. Thomas said he understood the position the panel believes it's in, however, he also believes that the panel has the authority to look at a decision and actually look behind why that decision was made. But if the issue comes up again and there is no issue of pretext, there's no arbitrary capriciousness, the person hasn't spent millions of dollars, then the panel can find that it was arbitrary and capricious and there was no pretext.

Chairman Gans said what he was hearing was one party says respond to the request for reclamation, then we'll pay; the other party is saying pay as the law requires, and then we'll consider how we go from here. It's an impasse. And this panel has to follow the law. The Chairman said they could decide to hold off on their decision if they thought giving ABC more time would make a difference.

Mr. Thomas said the panel has the authority to, at a minimum, deny the request right now based on the fact that this is not simply an issue of whether you pay the fee or not, that this is a broader question that you have to take into consideration in the course of the negotiation between the parties of whether it was done in good faith.

Mr. Porta asked if this was a new or a renewal permit? Mr. Thomas said it was a permit renewal.

Part III: Mr. Nubel said he didn't think it could be argued that the Division acted arbitrarily or capriciously here. The Division issued two notices of noncompliance, extended the deadline multiple times, held a hearing, and stated the reasons why the permit was going to be revoked in multiple letters, and still ABC refused to comply.

You are required under the NAC to specify your grounds for an appeal and check all boxes that apply. And there is a box for "final decision was arbitrary or capricious" and that box was not checked by ABC. The box that was checked was that there was an error of law on the part of NDEP, meaning that NDEP acted outside of its legal authority or did not have the legal ability to revoke the permit in question.

Mr. Thomas brought up Rule 56F a number of times for getting more time, but there was no amount of time that would change the fact of the case, the one material fact that mattered, which was that ABC did not comply with the law. They didn't submit the report and the fee that's required under the NRS and is required under the NAC. Any emails, anything that ABC was going to obtain during that time wasn't going to show that they paid the fee. They admitted this during their testimony and in their briefing. So, there's no reason for more time to be given.

Mr. Nubel said he would argue that the standard for summary judgment was that there was no genuine issue of material fact. The material fact in this case was whether or not ABC paid the fee. That's the fact. And that fact, there was no genuine issue as to it, because ABC admitted that, NDEP admitted that. They all acknowledge that the fee wasn't paid. There's no genuine issue as to that material fact. Given that, that undisputed fact, it is now the Commission's opportunity to

make a ruling as a matter of law that NDEP has the authority to revoke a permit based on a permittee's failure to pay its annual fee. That summary judgment was entirely appropriate here.

Chairman Gans said his understanding was that NDEP simplified the issue to the fee wasn't paid. Was that right?

Mr. Nubel said he thought that was a fair way to characterize it. That was the basis. NDEP provided a letter as to why the permit was being revoked, and the letter stated that it was because the fee was not paid. NDEP sent three letters saying pay your annual fee. It was all about the annual fee. That's why the permit was revoked, and under the law, is a proper basis for revoking the permit.

Mr. Nubel explained no matter what, the property still needs to be reclaimed. What this hearing was doing was taking the property out of the hands of ABC and putting it into NDEP's. NDEP has a bond of approximately \$250,000 that they can use to reclaim the property, and they also have the authority under the law to compel ABC to engage in any activities that are necessary to reclaim the property. This hearing was just the first step.

Mr. Gans asked if ABC would like to add anything further, and Mr. Thomas asked for a recess to consult with Mr. Ford. Chairman Gans agreed to a ten-minute break.

After the recess, Mr. Ford presented a lengthy explanation of his reasons for not paying the fees. He said, "If we just get back to going like Bruce Holmgren already put in writing, this won't be an issue. They promised me that I didn't have to keep continue paying this fee because I'm not mining. That's what they told me in 2011, 2012. I've been told twice, 'You don't have to do nothing, you don't have to worry about that.'"

Mr. Ford said he was asking for something that they promised him which was that the reclamation could go back as it was when Bruce Holmgren told him he could use the greenways. Mr. Ford said he couldn't afford to pay \$4,000 when there's no money coming in to pay to reclaim the property.

Ms. KC said Mr. Ford had stated that in his NDEP meeting of January 6th, 2020, he was told he didn't have to pay fees, but then in a separate sentence he said he was going to pay the fees of two years. The meeting with NDEP was on January 10th on the annual fee, and it still didn't get paid after that January 10th meeting.

Mr. Ford said he hired a consultant, Andy Jung, from Western Systems, after the January meeting. He did pond samples and said the property needed to be reclaimed. Mr. Jung sent an email to NDEP in February saying you couldn't grow anything on the property unless you got 12 inches of material in there. Mr. Ford said NDEP knew after the January meeting that Mr. Ford wasn't paying until Mr. Jung completed his tests.

Mr. Porta said he wanted to respond to one thing that Mr. Ford said during his testimony, that he was told in 2011 not to continue to pay his fee. Mr. Porta stated he saw nothing in the record like that. If he was paid from 2011 until 2017, and then letters were sent saying hey, you need to pay the fee, that statement was not supported in the record anywhere.

Chairman Gans asked if there were any final questions before deliberations began, and there were none.

The Chairman started off by saying he was “really troubled” by the fact that they seemed to be at an impasse. There were some misunderstandings. He said he understood the 56F that was brought up, but depending on what they believed the issue was, that may or may not be at all under the panel’s consideration. The Chair said he understood that ABC feels that NDEP was withholding approval. Why should they pay their fee when NDEP was withholding approval? Bottom line: the panel was to look at one major issue, and not a lot of the side issues that went along with it.

Ms. KC said the motion for summary judgment discussed the multiple letters that were sent as far as the NRS which required the annual payment. It was very clear that if the payment didn’t get made, the permit would be revoked. And although NDEP didn’t state anything in their letters about the required plans, plans weren’t submitted either.

Mr. Porta said the summary judgment hearing required them to make sure they heard all of the appellant’s arguments, and he thought they did. Mr. Porta saw it as two separate issues. There’s the issue with the plan, and the approval of the plan, what was agreed to and what wasn’t agreed to. To Mr. Porta, that was a separate issue than what they were supposed to consider. What the panel was supposed to consider was the permit renewal. When any entity signs on with a permit with the Division, they’re required to meet the requirements that are in the permit, and part of that is to pay the fees, submit reports, do testing and things of that nature. Everything they heard today shows that this fee was not paid to the Division as required. And that fee and other requirements are supposed to be complied with regardless of compliance status or whether you have an issue with the Division.

Mr. Porta said when he looked at ABC’s appeal form, the appeal form did not contend that the fee was the issue that they were supposed to hear. The panel had to decide what was before them today. Did or did not ABC pay the fee? It’s clear they did not pay the fee required by the regulations and statutes, and that’s what they had to determine today. Mr. Porta said he didn’t see anything else that was presented evidence-wise or information-wise that showed otherwise.

Chairman Gans said he totally agreed with Mr. Porta. The issue was the permittee had to pay that annual fee, regardless of anything else. It’s in the law and a requirement. ABC chose not to pay the fee and argued that they needed to have NDEP approval before they did so. That isn’t how it works. To some degree it looks like NDEP is saying that in this preconference hearing, they give up, they’ve made three attempts, it’s not getting paid, they have no choice, they’ve been backed into a corner

and there's nothing more they can do under the law. Chairman Gans added that ABC's request under 56F was not germane to what the panel had to consider.

Mr. Porta said ABC Recycling Industries didn't show or present any evidence that NDEP committed an error of law, and in fact, the Division actually acted within the regulation statutes in this matter and allowed additional time for ABC Recycling to pay the required fee, and they didn't.

There were no further questions or comments, and Chairman Gans said he would accept a motion to either uphold or dismiss the motion for summary judgment by NDEP.

Motion: Uphold the motion for summary judgment in favor of NDEP

By: Ms. KC

Second: Mr. Porta

Vote: Passed unanimously

4) Public Comment #2 (Action item)

There was no public comment.

5) Adjournment

After thanking everyone, Chairman Gans adjourned the hearing at 10:35 AM.